Testimony on Senate Bill 305 before the Senate Local Government Committee
February 6, 2007
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All the easy land to develop in Montana has been subdivided. The proposed subdivisions that counties are seeing now have problems. This bill proposes to eliminate provisions designed to address those problems, and to make it easier to obtain approval for problem subdivisions and to avoid paying for their impacts.

Section 1. I fail to see how the public health and safety is promoted through the transfer and subdivision of land. Which property owners' rights will be protected—the neighbors or the subdividers? This provision, in and of itself, is full employment for attorneys long after I have retired.

Section 2, p. 2, line 10. If you look at the tan code booklet the Montana Association of Counties provided to you earlier in the session, you will see that this provision is already in 76-3-102 (8) in the statement of purpose of the Montana Subdivision and Platting Act ("MSPA") on page 1056 of the code. Again, I do not know which property owners' rights are supposed to be protected, but with this term inserted into the MSPA in two more places with this bill, we will probably see a case about it.

Section 3, p. 2, lines 27 and 28. Keep in mind 76-3-504 is a list of <u>minimum</u> requirements for subdivision regulations. The subdivision regulations may have the general language in 76-3-504(1)(e) in them, but not a map of every hazardous area. The regulations will have examples of what may be hazardous, such as steep slopes, high fire hazard areas, areas of seismic concerns, high radon areas, high groundwater areas and floodways for sheet flooding. Then, if the review of a proposed subdivision raised the issue it may be in one of these areas, there will be heightened scrutiny of whether the subdivision is appropriate.

I cannot figure out how subdivision regulations can be based on "substantial credible evidence" which is a buzz-word used throughout this bill.

Section 3, p. 3, line 21. The public hearing "under" 76-3-503 is a hearing on proposed subdivision regulations. The public hearing for those subdivisions that require a hearing (not all do) is found in 76-3-605. On **line 20** the term "part" is used. What does this refer to? 76-3-504(1)(i) or Part 5 of the MSPA?

Section 3, p. 5, line 14. The stricken language was carefully debated among the working group for the Interim Local Government Subcommittee, during the 2003-2005 interim, and is worded the way it is so planners, most of whom are not attorneys, can provide information to the subdivider but not be held liable if the information is incomplete. This change shifts the responsibility for knowing the law from the subdivider to the planner. Subdividers make money when they sell lots in subdivisions. They should hire their own attorneys.

Section 4, p. 6. The changes in this section are designed to make the county taxpayers pay for development—not the subdivider who is going to gain financially from the sale of the lots. Much is said about promoting "affordable housing" but my experience is the more "affordable" housing is, the cheaper it is. Therefore, when things go wrong, the remedies fall on those who are the least able to bear the expense.

Line 4. What does "local government's limits" mean? Within the local government's jurisdictional area?

Line 7. Who is the "third party"? Who pays for the third party evaluation? Does this bill create a whole new cottage industry?

Lines 8 and 9. Suppose a 2-track road is just fine for the 2 farms on that road. The average daily trips on that road would be 16. Then one farmer sells to a subdivider who wants to create 200 lots accessed by that road. Is upgrading the road so it can handle 1608 trips per day, rather than 16 a "correction of existing deficiencies"?

Or how about a proposed subdivision on a narrow state highway which handles the traffic from the few houses along the highway just fine in its present condition? A subdivider buys a ranch along the state highway and proposes hundreds of lots, which will increase the average daily trips to 2400. The highway can't safely handle that traffic. Is that an "existing deficiency"?

Lines 10-12. If I can figure this additional language out, it appears to say if local government requires an upgrade, say to a road, to service a subdivision then the local government has to assess all the existing properties on the way to the subdivision to pay for an upgrade, which would not necessarily be needed if there was no proposed subdivision.

Lines 14-15. No one knows what this means, but perhaps it is related to my state highway hypothetical, or to a turn-out on a state highway, or to a stop light, all of which are related to public health and safety. How about moving a portion of a state highway, or moving a utility line or moving the Yellowstone Pipeline?

Section 5, page 6

The element and the sufficiency review were also carefully debated during the 2003-2005 interim by all interests. We thought the 5-day element review should be easy to meet. It is a checklist. Then I received a call from one of our Eastern Montana counties—one of those counties where the clerk and recorder is also the clerk of court and also the person who accepts subdivision applications. But she has enough to do, so she mails the subdivision application to John Marks, a planner in Miles City, who performs the planning duties for many Eastern Montana counties. Maybe, with the two mailings, he can't do the element review in 5 days. This section may deem the application approved.

Page 6, lines 26-27. It is almost unheard of for a governing body to conduct an element review. If this change is expanded to include the planner, this change in the law would allow just anything to be considered containing all the elements required for a subdivision application.

Page 7, lines 10-11. This change ties the hands of planners who may have done their best during the element review and the sufficiency review, yet in the actual review discover additional issues. What if those issues involve public health and safety? The way this change is phrased, and considering the rest of the bill, the subdivider would

be precluded from addressing the issue and the county commissioners may be required to deny the subdivision or the county commissioners may have to actually approve a subdivision that will undermine public health and safety, for which the county would be liable.

Section 5, Page 7, lines 12-13. Again, almost no governing body conducts a sufficiency review. I suspect the instance in which a planner misses the 15-day deadline is rare, so this change appears to be a solution looking for a problem.

p. 7, lines 26-27. The reference to "this section" is vague and ambiguous—does it refer to any deadline in 76-3-604 or to the 60-working days in subsection (4), which is the only time a governing body acts on a subdivision application? If the former, that means a subdivision application that does not address all of the regulatory elements, or is not sufficient for review is "considered approved" possibly without any real review or conditions of approval to address the problems with the subdivision.

I saw a laughable subdivision application submitted by an insurance agent for a small town out in the middle of nowhere. If that application had been "deemed approved" if the county had missed a deadline, it would have been a public health and safety fiasco and many lot purchasers would have bought a pig in a poke. And they would want the county to fix the problems.

Another issue is: if a deficient subdivision application is deemed approved, does that constitute a decision of the governing body for purposes of an appeal pursuant to 76-3-625(2) (page 1078 in your code book), so the county is forced to defend a subdivision approval it disagrees with? Or can the county just refuse to defend, so the appellant prevails and a court decides to deny the subdivision? Where is the benefit to anyone?

Counties are faced with enough problems created by all the 20-acre "lots" surveyed just before the MSPA increased the lot size to less than 160 acres in 1993. Do we need to add to that burden by the law deeming poor subdivision applications "approved." I think not.

This is a bad bill but lines 26 and 27 on page 7 may be the worst part of it.

Section 6, p. 8, line 28. Here is the "substantial credible evidence" terminology again. This might work for a county that has a civil attorney who can explain that term (very few in number) but I suspect a subdividers' assessment of whether the evidence is substantial and credible might be different from what the county commissioners think—and only a court can settle that. I have had a least one judge tell me he doesn't want to be in the subdivision business. Why encourage lawsuits?

p. 8, lines 27-28. Why delete the term "additional information." We have 76-3-615 to deal with additional information.

p. 9, line 17. Somebody—probably an attorney—really likes the term "substantial credible evidence." County commissioners and city council persons are not attorneys—they do their best to weigh the impacts in 76-3-608 (3)(a) [*see* the top of this page]. Why add a threshold that will simply engender more lawsuits?

p. 9, lines 25-27. I just asked you to look at the top of this page. Lines 5 through 7 list the impacts a governing body must consider, yet this section states the only reason for a denial is public health and safety. While I agree that a denial based, at least in part, on public health and safety is more defensible, there are instances in which one of the other impacts, which cannot be mitigated, may be a reason to deny a subdivision. Weighing the impacts as required in 76-3-608 (2) above will be an exercise in futility.

Section 7, p. 10. I don't know if the proponents of this bill realize this section precludes the subdivider from providing additional information.

Section 8, p. 11, lines 15-16. 20 calendar days does not work for either large or small counties. 30 working days may, but putting a time limit in state law does not take into consideration local conditions.

Section 9, p. 12. Filing suit before the written decision may be an effort in futility, because the complaint may have to be amended when the written decision is issued. This provision just creates more work and fees for attorneys.

I believe addressing a time limit within which a governing body must issue a written decision is part of a carefully thought out, comprehensive bill soon to be introduced in the House.

Thank You